No. 2943.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

James B. Simpson, Indicted as James B. Miller,
Plaintiff in Error,
vs.
The United States of America,
Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR.

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ARGUMENT ON DEMURRER.

The plaintiff in error in this case was convicted by a jury on the second count of an indictment containing two counts, the charging part of the count upon which he was convicted reading as follows:

> "That James B. Miller * * * on or about the 26th day of November, 1915, within the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly, unlawfully and wilfully per-

suade, induce and entice a certain woman, to-wit: one Vida White, alias Vida Rogers, whose full and true name other than as herein stated, is to the grand jurors unknown, to go from one place to another in foreign commerce, that is to say, to go from the city of San Francisco, state of California, to the town of Tia Juana, in the Republic of Mexico, via the Southern Pacific Railroad Company, a common carrier, from the said city of San Francisco to the city of San Diego, California, and via automobile stage, a common carrier, from the city of San Diego, California, to the town of Tia Juana, Mexico, for a certain immoral purpose, to-wit, for the purpose of having said Vida White, alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse."

This indictment was obviously drawn under section 3 of the Act of June 25, 1910, commonly known as the "Mann White Slave Act," said section reading as follows:

"That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or

assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court."

The plaintiff in error interposed a demurrer to the second count of the indictment upon which he was convicted and assigns as error the overruling by the lower court of his demurrer to such second count of the indictment.

Counsel for plaintiff in error argue but two points on their demurrer, one that the second count of the indictment does not state facts sufficient to constitute an offense against the laws of the United States, and the other that the said second count of the indictment does not substantially conform to or comply with the requirements of section 950 of the Penal Code of the state of California, the state in which the lower court was holden.

As to the first ground of demurrer argued in the brief of plaintiff in error, it will be observed from a careful reading of section 3 of the act under which the indictment is drawn that there are several offenses described therein, two of which are as follows:

(a) The offense of knowingly persuading, inducing, enticing, or coercing, or causing to be persuaded, in-

ducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery or for any other immoral purpose.

(b) The offense of knowingly persuading, etc., any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, with the intent and purpose, on the part of such person, that such woman or girl shall engage in the practice of prostitution or debauchery or any other immoral purpose, whether with or without her consent, and who shall thereby knowingly aid or assist in causing such woman or girl to be carried or transported as a passenger on the lines or route of any common carrier, etc.

The second count of the indictment having followed the language of the statute in its charging part, as to the first of these offenses above described, undoubtedly charges an offense against the laws of the United States if the immoral purpose as set out in the indictment is such an immoral purpose as is contemplated by the statute. The immoral purpose, as set out in the indictment, is "for the purpose of having said Vida White, alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse."

Counsel for plaintiff in error argue to this court that this immoral purpose set out in the indictment, while undoubtedly most reprehensible and immoral, is not

such an immoral purpose as was contemplated by the statute. They argue that by the doctrine of *ejusdem generis* the "other immoral purpose" spoken of in the state must be such an immoral purpose as would result in the personal sexual debasement of the woman or girl so transported. Even following the strictest interpretation of the doctrine of *ejusdem generis,* it is difficult for us to follow the reasoning of counsel for plaintiff in error through to their conclusion that the immoral purpose as set out in the indictment is not of the same character as prostitution and debauchery. A person with the least vestige of morality could not be mistress of a house of prostitution, and such a place is only calculated to further the licentiousness and immorality of all of its inmates, including the mistress. If such a purpose is not an immoral purpose within the meaning of the statute, then we cannot conceive of any reason for the addition of the words "any other immoral purpose" to the statute. The immoral purpose described in the indictment most certainly has to do with debauchery, with prostitution and with the disintegration of the morals of every person connected with such house of prostitution, either as inmate or mistress. We have carefully examined all of the authorities referred to by counsel for plaintiff in error upon this point, and we believe that the case of Athanasaw v. United States, 227 U. S. 326, enunciates the true rule, and we believe that this court will follow the ruling in that case. The court in that case approved the instructions of the lower court to the effect that "the statute had a more comprehensive prohibition and was designed to reach acts which might ultimately

lead to that phase of debauchery which consisted in sexual actions." We do not believe that it is necessary to cite any further authority upon this point. The preservation of a pure mind and body by a mistress of a house of prostitution is so foreign to human experience and reason that counsel's argument on this point, while ingenious, is certainly not persuasive, and we have no hesitancy in believing that this court will declare the transporting or inducing of a woman to go in interstate or foreign commerce to become mistress of a house of prostitution falls squarely within the term "or any other immoral purpose" used in the act.

As to the second ground of demurrer argued in the brief of plaintiff in error that the indictment does not conform to the California Penal Code, we will only state that we find no authority for the contention of counsel of plaintiff in error that such must be the case, nor have they cited any authority supporting this contention. In the United States courts it is only necessary that the indictment sufficiently charge the offense as laid in the statute and with sufficient particularity to apprise the defendant of the nature of the offense with which he is charged and to enable him to prepare his defense.

The second count of the indictment in question follows the language of the statute and sets out the offense to such a degree that there is no ground for doubt as to the nature of the offense charged against the defendant.

STATEMENT OF FACTS.

Inasmuch as the brief of plaintiff in error dwells at great length upon the insufficiency of the evidence, we believe that it would materially assist the court in passing upon this point and others raised by plaintiff in error if we should outline the evidence in this case. It will be remembered at all times that no witnesses were produced except those produced on behalf of the Government, and in the absence of any impeaching testimony or contradictory testimony we must accept their testimony at its full face value. To begin with, the plaintiff in error was indicted as James B. Miller, and was known as James B. Miller to all of the witnesses testifying on behalf of the Government and for convenience we shall use this name in our argument. When he was arraigned under the indictment, he gave his true name as James B. Simpson [Tr. 9]. The first witness on the part of the Government was Louise Bordeau. In 1915, she was living in San Francisco, and while living there knew a woman in San Francisco by the name of Vida Rogers, who also was known as Vida White. Louise Bordeau met Vida White in a house of prostitution at number 43 Washington alley, where Vida White was the mistress, or housekeeper, and Louise Bordeau was an inmate. This was about July, 1915. She first met defendant in San Francisco while she was practicing prostitution at number 43 Washington alley. Vida Rogers introduced James B. Miller to her and she saw him a number of times at this house of prostitution at number 43 Washington alley, San Francisco. She knew Miller under the name

of Jim Miller. The day after Thanksgiving, 1915, she left number 43 Washington alley with Vida Rogers. Vida Rogers also maintained a residence at the Berkeley Hotel. Shortly before these women left San Francisco, Vida Rogers received two telegrams the contents of which Louise Bordeau related (the contents of both of these telegrams were subsequently taken from the jury). They left via Southern Pacific Railroad from San Francisco, and had through tickets to San Diego [Tr. 69]. The defendant met them at the depot in San Diego. Louise Bordeau remained over night in San Diego, and she saw Vida White get on a stage marked "To Tia Juana, Mexico," and the next day she saw her at The Palace in Tia Juana, Mexico, and Miller was also there [Tr. 54]. Louise Bordeau remained in The Palace, which was a house of prostitution, from the time she arrived there, in November, 1915, until after the flood, which was some time in January, 1916, during all of which time Vida Rogers was the landlady or mistress of The Palace.

Miller visited The Palace several times while Louise Bordeau was an inmate, and when there ate at the restaurant for the girls connected with The Palace. She heard him state that he owned The Palace [Tr. 44-45]. There were about twenty-two girls connected with The Palace. Louise Bordeau got a license from the Mexican officials to practice prostitution, and Vida Rogers got a license also to run a house of prostitution. It hung on the wall of the bar room in The Palace. She also had a license to sell liquors and tobacco.

David Gershon, a witness called on behalf of the Government, testified that he was a special agent of the department of justice; that about ten days before the trial he saw Vida Rogers in Mexico, and that he had been endeavoring since February or March of 1916 to serve her on this side of the line with a subpoena in this case. He did not have a subpoena, but, being a special agent of the department of justice, expected to hold her until a subpoena could be secured if he could catch her on this side of the line.

Ernest Estudillo testified on behalf of the Government that he knew the defendant James B. Miller, and that he went to work for him in Tia Juana about the 29th day of December, 1915, at The Palace, which he knew to be a house of prostitution. Mr. Miller gave an order to Tony, the bartender at that place, to pay the witness his fees. He was acting as a special officer.

There were two buildings at The Palace, one known as the old building, which contained a kitchen, dining room, bar and five rooms, and the new building, which contained eighteen or twenty rooms.

Charles H. Cousins testified on behalf of the Government that he was a carpenter and builder and resided in San Diego; that he had known the defendant for about two years; that he built The Palace in Tia Jauna for the defendant, who paid him for building it. He built both the old and the new buildings, but the old building was built some four or five months before the new building and was built for a man named Savin.

H. M. Stanley, a witness on behalf of the Government, testified that he was a police officer in San

Diego; that he knew The Palace in Tia Juana and had known it since it opened; that he knew the defendant and had seen him at Tia Juana at The Palace. On one occasion, he had a conversation with him about The Palace when he went with an officer named Whistler to investigate a couple of the girls at The Palace. He asked Miller in regard to these girls, and he said: "I will see my landlady and she may give you this information." Miller consulted the landlady, whose name was White, in the presence of Stanley, after which Stanley said: "You might run up against a snag, Miller, in running this place," and Miller replied: "Well, I am in the clear. I don't run it, but my landlady runs it for me." The witness knew The Palace to be a house of prostitution.

The balance of the testimony, as set out in the transcript of record, was largely taken up with an effort on the part of the prosecuting attorney to introduce into evidence certain telegrams, which he stated in his opening statement to the jury were sent by Miller from San Diego to Vida White in San Francisco, and by Vida White from San Francisco to Miller in San Diego, but these telegrams were refused admittance by the court.

Julian Eugene Cliff testified on behalf of the Government that he resided in San Diego, California, and in November, 1915, was the manager of the Victoria Apartments in San Diego, located at number 1069 Tenth street; that he knew the defendant Miller, and that Miller had an apartment at his house in November, 1915, the number of which was 31. Miller had a telephone in his apartment, and he had a special num-

ber for this telephone, which was Main 6626; the defendant's wife lived there with him.

Arthur William Mosedale testified that he was an employe of the telephone company, and on October 11, 1915, installed a telephone in apartment 31 of the Victoria Apartments in San Diego, the number of which was Main 6626.

F. A. Bennett testified that he was manager of the Western Union Telegraph Company at San Diego, and had been since 1912; that he knew the defendant Miller, and that Miller had a charge account with the Western Union in San Diego. He presented a charge card issued to J. B. Miller by the Western Union Company, which was introduced as Plaintiff's Exhibit 1 and which is set out on page 54 of the transcript. Witness was shown a telegram which was designated United States Exhibit 2 for Identification, concerning which he testified that it was a part of his office records and was a telegram which was received by telephone to be sent and that it was sent; that it was filed November 15th and sent November 16th, and that he could tell from looking at the telegram from what number it was telephoned; that in the due course of the business of the Western Union Telegraph Company, when a telegram was received over the telephone it was placed on a special blank, which blank showed the date, the telephone number from which it was telephoned, the originating point, the destination and the trancript of what was said over the telephone. All these things were done in this instance according to the due course of business of the said company. Witness produced a carbon copy of a bill rendered to Mr. Miller for

November, 1915, which was marked United States Exhibit 3, and a daily cash receipt record which was marked United States Exhibit 4. The telegram known as United States Exhibit 2 for Identification, according to Exhibits 3 and 4, was charged to Mr. Miller's account and was paid for. United States Exhibits 3 and 4 were received in evidence, but 2 for Identification was refused. Exhibits 3 and 4 are set out on pages 60 and 61 of the transcript. All these records conformed to the routine of the office of which the witness was manager.

Witness further testified that Exhibit 2 for Identification conformed in all particulars to the rules of the company and was the original telegram on file in the office at San Diego.

Myrl Stetzel testified that she was a clerk in the office of the Western Union at San Diego, California and was such clerk in November, 1915. She testified that she made out the bill known as Plaintiff's Exhibit 3 and mailed the original to J. B. Miller, Victoria Apartments, and that she made the bill from the telegrams on file in the office.

Etta Naylor testified that she was cashier for the Western Union and was such during the month of November, 1915, and that Plaintiff's Exhibit 4 was made out by her in the due course of business.

F. A. Bennett, recalled as a witness for the Government, testified that United States Exhibit 5 for Identification was a telegram taken from the files of the office at San Diego and was the original record on file there. It bore sending marks which it would not bear unless it had been sent. United States Exhibit 6 for Identifi-

cation was a copy of a telegram received at San Diego on November 26, 1915, the original of which was delivered in San Diego. Exhibit 7 for Identification was the delivery sheet of the Western Union for November 26, 1915. The Government offered the telegram received and delivered in San Diego, known as United States Exhibit 6 for Identification, together with Exhibit 7 for Identification, the delivery sheet, in connection with the bail bond filed in the case by the defendant. The bond was offered for the purpose of placing in evidence an exemplar of the signature of the defendant, and was offered on the theory that it was a part of the files of the case filed by the defendant purporting to be signed by him on its face, and he was therefore bound by the instrument which he filed in the case unless such instrument were overturned by affirmative evidence. The court refused to allow the bond to be used as such exemplar, and refused the admission of United States Exhibits 5, 6 and 7 for Identification.

ARGUMENT.

Point two argued by counsel for plaintiff in error on pages 22 *et seq.* of the brief has to do with the court's admitting certain evidence into the record which was subsequently stricken out. The prosecuting attorney offered to prove by the witness Louise Bordeau that Vida White received two telegrams in San Francisco, and in the first instance merely offered to prove that the contents of telegrams offered as United States Exhibits 2 and 5 for Identification were the same as the telegrams received by Vida White in San Francisco

without revealing to the jury the contents of the telegrams received by Vida White or the contents of those offered for identification. After some argument, the prosecuting attorney explained to the court that Vida White was without the jurisdiction of the court and he expected so to prove, and upon his offering so to prove this point the court suggested [Tr. 40] that the better way to proceed was to have the witness relate from memory what was received in the telegrams by Vida White.

Counsel for plaintiff in error, on pages 30-31 of the transcript, censure the prosecuting attorney in no light terms for his statement that he would prove that Vida White was without the jurisdiction of the court, and states: "No proof of this alleged fact was made and again did a man's liberty hang in the balance by the slender thread of a promise unfulfilled and unkept."

Counsel in their ardor have overlooked the testimony of the witness Louise Bordeau, that the last time she saw Vida White she was in Mexico; of the witness Stanley that he saw her in Mexico, and of the witness Gershon who saw her in Mexico ten days before the trial and who was waiting for an opportunity to secure her as a witness at the trial of this case. Therefore, the prosecuting attorney fulfilled his promise to the court and showed that the recipient of the telegrams was not within the jurisdiction of the court, and against his better judgment [Tr. 40], but, at the suggestion of the court, proceeded in the manner suggested by the court, to-wit, to allow the witness Louise Bordeau to testify as to the contents of the telegrams received by Vida White in San Francisco. The prosecuting attor-

ney was induced to take this procedure because of his unqualified belief in the admissibility of the telegrams offered for identification and of the other exhibits offered for identification, which would have shown beyond doubt the connection of the defendant with the telegrams offered and the ones received by Vida White in San Francisco. This statement is made merely to correct the allegations of counsel that the prosecuting attorney was not fair in the trial of the case.

We do not believe that there was any error on the part of the court in permitting the witness Louise Bordeau to testify to the contents of the telegrams received by Vida White in San Francisco, in view of the subsequent testimony introduced on behalf of the Government and exhibits offered by the Government, but refused by the lower court, which exhibits we have asked be sent to the clerk of this court so that they may be available for inspection by this court.

There are two things necessary to constitute the crime under which this indictment was brought; first, an inducement to travel in interstate or foreign commerce for an immoral purpose; and second, the actual traveling in interstate or foreign commerce for an immoral purpose. Therefore, the inducement, as well as the traveling, of the woman becomes a part of the *corpus delicti.* In this case, the traveling of the woman in foreign commerce is indisputably proved. The telegrams which Vida White received in San Francisco were undoubtedly one element of the inducement for her to go. Therefore, it is our contention that the telegrams or their contents, as received by Vida White, were admissible in evidence as a part of the *corpus*

delicti, and the Government could then show by circumstantial evidence or otherwise that the defendant was connected with such inducement.

The telegrams as testified to by Louise Bordeau were substantially as follows [Tr. 42]:

> "It was about a house with a dance hall kitchen and bar and five rooms in connection looks like a good proposition will finance everything will split fifty fifty."

and was signed "Jim."

The second telegram was to the effect

> "That everything ready, leave Thursday or Friday."

Now, the house to which Vida White went in Tia Juana was the house owned by Miller and contained five rooms, kitchen and dance hall and bar room [Tr. 46]. After Vida White arrived in Tia Juana, an additional house was built containing eighteen or twenty rooms.

In regard to the second telegram, Vida White and Louise Bordeau actually left San Francisco at the time indicated in the telegram and were met by the plaintiff in error in San Diego. The plaintiff in error was further connected with telegrams sent to White in San Francisco by United States Exhibits 3 and 4, showing a charge account and the payment of the same with the Western Union Telegraph Company at San Diego, wherein two telegrams of about the same date as those testified to by Louise Bordeau were sent and charged to him and subsequently paid for. Therefore, inasmuch as the inducement is a part of the *corpus delicti* and in this case the telegrams were a part of the

inducement, we maintain that the circumstances delineated were sufficient to justify the jury in their verdict.

But there were more circumstances connecting the defendant with the telegrams testified to by Louise Bordeau which were denied admittance by the court. For instance, United States Exhibit 2 for Identification, which read as follows:

"Date 11-15-15
Central Office M.
Telephone No. 6626
Class of Station Sub
Originating Office
(a) San Diego
Terminating Office
(b) San Francisco
Kind of Message (if not day telegram)
N L
CHARGES
Paid Collect
(cross off word not required)
This line $———
Orig. extra line 45
—
Term Ex. L. or O. L.——
Messenger ———
———
Total $ 45
———
Recording Office (if not

THE WESTERN UNION TELEGRAPH COMPANY
Telegram Received via Telephone

Recorder's Sig.	Time filed	Check
HS	11.25 m	56 N.L. Pd 48

Charge
A1 Gs S S A1 22 11-16
Miss Lyda White
Hotel Berkley–Sutter st
near Grand Av
San Francisco–Cal

New House twenty foot Dance hall and bar. Eight rooms with Kitchen you had better come down and look it over. Will finance proposition. We will split fifty fifty wire me when you are coming. Special rates Yale and Harvard. Must close deal by Thursday. Looks good to me.

only record'g ofc. for (a)

Sender's name
Mr, Miller

Sender's address

Subscriber's name
49 ~~Camp~~ Mr. Miller

Lay off a week and come down.

Jim.

Examined
C

Billed & Collected by Telegraph Co.

(Continue message on back)"

and concerning which it was testified that it was a record of the Western Union Telegraph Company in San Diego and was telephoned from the number in the upper left-hand corner of the blank, which was Main 6626, and which number was the private telephone of the plaintiff in error. This telegram was charged to the plaintiff in error and was paid for. Louise Bordeau testified that Vida White maintained an apartment at the Hotel Berkeley in San Francisco also.

United States Exhibit 5 for Identification, which read as follows:

"Date 11-23-15

Central Office
Telephone No. M 6626
Class of Station Sub
Originating Office (A)
San Diego
Terminating Office (B)
San Francisco
Kind of Message
(if not day telegram)
N L

THE WESTERN UNION TELEGRAPH COMPANY
Telegram Received via Telephone

Recorder's Sig. V F | Time filed | Check 14 Pd WL 40

Charge
Nov 23 1915

Vida
Mrs. ~~Ida~~ White
Hotel Berkeley
San Francisco Cal

CHARGES

Paid ~~Collect~~ ~~se~~

(cross off word not required)

This line $ 40

Orig. Extra Line———

Term: Ex. L. or O. L.—

Messenger ———

Total $ 40

Recording office (if not only record'g ofc. for (a)

Sender's name
J. B. Miller

Sender's address

Subscriber's name
Same

Sutter St near Grant Ave

Be here Friday night or Saturday morning. Everything ready. Wire when you are coming.

J. B. Miller

Examined
A

B 41 Gs A Pd W

Billed & Collected by Telegraph Co.

(Continue message on back)"

was a telegram on file in the office of the Western Union Telegraph Company at San Diego which was telephoned from Main 6626.

United States Exhibit 6 for Indentification was a telegram received in San Diego and delivered to J. B. Miller, Victoria Apartments, 1069 Tenth street, and read as follows:

" Ray 445 PM 40

C252GS K 6

F D San Francisco Cal 437P Nov 26 1915

J B Miller 1069-10th

Victoria Apts 5-12 p

Concessioner San Diego

Will be in tomorrow at noon.

White

453PM"

This is evidenced by delivery sheet offered as United States Exhibit 7 for Identification, which is a receipt of J. B. Miller for this telegram.

The bail bond of the defendant was offered as an exemplar of the signature of Miller, but was refused, but taken in connection with Exhibit 7 for Identification proves the signature of Miller, and Exhibit 7 for Identification proves the receipt by J. B. Miller of Exhibit 6 for Identification, and Exhibit 6 for Identification is conclusive proof of the receipt by White of Exhibit 5 for Identification and of the understanding between Miller and White of the time of the arrival of the train in San Diego on which White should travel, for Miller met the train in accordance with the understanding arrived at by these two telegrams.

All of these exhibits as we have stated, have been transmitted to this court for examination by this court. We therefore maintain that there was no error in the court's permitting Louise Bordeau to testify concerning the contents of the telegrams received by Vida White in San Francisco and that the plaintiff in error was therefore not injured by their introduction, even if the argument of counsel for plaintiff in error is correct that the

jury were unable to efface from their memories such testimony upon the instruction of the court.

But the court struck out all testimony relative to the contents of the two telegrams testified to by Louise Bordeau, and on pages 73-74 of the transcript said: "I will strike the evidence out concerning the contents of the telegram as testified to by the witness; and I instruct you gentlemen of the jury, that you shall consider this case without considering that testimony, and shall not consider any testimony that has been stricken out." The matter was more particularly called to the jury's attention by the court's remarks previous to this ruling and the remarks of counsel for the plaintiff in error made in their hearing, as follows:

> "The Court: Well, now, over the objection of the defendant, a witness was permitted to testify to the contents of a telegram in the hands of Vida White at San Francisco. What do you desire to do with that for the defendant? It was admitted on certain representations made by the United States attorney, which undoubtedly were made in good faith.
>
> Mr. Rush: We move that that testimony of the witness Louise Bordeau, concerning and referring to a telegram, which she said she saw in the hands of Vida White, or Vida Rogers, in San Francisco—that all such testimony be stricken out, on the grounds stated in the objection at the time the objection was interposed to such testimony; and on the further ground that the proper foundation has not since been laid for the introduction of that testimony, and it has not been connected up with the defendant."

Counsel argues with great vehemence that "the action of the court in striking this evidence from the record did not cure the error in its admission," and quotes a number of decisions of the various states to uphold his contention, but he does not cite any authority which is binding upon this court, nor does he cite any federal cases. The true rule, and the one followed in federal courts, is that set out in Pennsylvania Company v. Roy, 102 U. S. 451, quoting from page 459:

> "The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

This rule is quoted with approval in the case of

Krause v. United States, 147 Fed. 442.

See also:

Tubbs v. United States, 105 Fed. 59;

Hopt v. Utah, 120 U. S. 430, 438.

Therefore, following the reasoning in these cases, if there were any error on the part of the court in admitting the contents of these telegrams, and we do not admit that there was, it was cured by the instruction of the court set out on page 73 of the transcript.

In answering point three of the argument of plaintiff in error, it is only necessary to call the court's attention to the fact that in the assignment of errors filed by the plaintiff, and upon which this appeal is based, there is no error assigned in the admittance by the lower court of United States Exhibits 3 and 4, and under rule 11 of the rules of this court, this court will not now consider any alleged errors not assigned according to the rule. To be sure, the court may notice at its option any plain error, but there is no error plain or otherwise in the admittance of these two documents into the record. J. B. Miller was the only person of that name in the city of San Diego who had a charge account with the Western Union Telegraph Company. United States Exhibit 3 was the carbon copy of the bill mailed to J. B. Miller at the Victoria Apartments, San Diego, during a time when he was shown to be residing at that place, and was a regular record kept in the due course of business by the Western Union Telegraph Company at San Diego. United States Exhibit 4 was one of the records of an account kept in the due course of business by the Western Union Telegraph Company of San Diego, and shows upon its face that the bill known as United States Exhibit 3 was paid. Of course, the books of accounts of individuals or corporations kept in the due course of business are admissible in evidence, and in this case these exhibits being such records of an

account with J. B. Miller at the Victoria Apartments in San Diego, they are admissible and *prima facie* evidence of their contents, which can only be overturned by affirmative evidence, and the plaintiff in error offered no evidence relating to them in any manner whatsoever.

Points four and five of the brief of plaintiff in error have to do with the sufficiency of the evidence, it being alleged that there is not sufficient evidence in the record as it stands to sustain the verdict of the jury. This case, like all criminal cases, may be proved by circumstantial evidence, and it is not necessary that there be any direct evidence if the jury is satisfied from the facts and circumstances presented to them that the defendant was the author of the crime as charged in the indictment. On page 53 of the brief of plaintiff in error the rule is correctly stated that this court will not disturb the verdict of the jury when there is *any* evidence whatever to sustain the same. A careful reading of the transcript will show that there is plenty of evidence to warrant the verdict of the jury, and indeed it would be inconceivable that they would arrive at any other conclusion than that at which they did arrive, unless the circumstances proven by the Government should in some manner be explained or refuted.

The plaintiff in error was a married man [Tr. 53]. He lived with his wife from about September 28, 1915, through November, 1915, at the Victoria Apartments, 1069 Tenth street, San Diego, California. He had a charge account with the Western Union Telegraph Company at San Diego [Tr. 54], and during the month of November, 1915, the records of the Western Union

Telegraph Company at San Diego show that on November 15th he sent a telegram to White in San Francisco, costing forty-eight cents, and on November 23rd one to White in San Francisco, costing forty cents [Tr. 60]. These bills were afterwards paid [Tr. 61]. He was acquainted with Vida White, alias Vida Rogers, and visited her a number of times at 43 Washington alley, San Francisco, between July and the time that she left San Francisco and went to Tia Juana. Number 43 Washington alley was a house of prostitution. Vida Rogers, in company with Louise Bordeau, left San Francisco for Tia Juana on the day after Thanksgiving in November, 1915, and were met at the train in San Diego by plaintiff in error. Louise Bordeau stayed in San Diego over night, and Vida White went to Tia Juana where Louise Bordeau saw her the next day at The Palace, a house of prostitution. Plaintiff in error was also there. Louise Bordeau remained as an inmate of The Palace and Vida Rogers was the mistress, or landlady.

James B. Miller built The Palace and paid for it. He was often seen around there and often took his meals with the girls when he was there. He engaged Ernest Estudillo as a policeman at The Palace, or, in the common vernacular of the street, as "a bouncer," and he gave orders for his pay. He told Louise Bordeau that he owned The Palace [Tr. 45].

H. M. Stanley visited Miller at The Palace in Tia Juana and remonstrated with him regarding his running the same, and asked about certain girls who were there, whereupon Miller replied: "I will see my landlady and she may give you this information." When

Stanley suggested that he might get in trouble over this place, he replied: "Well, I am in the clear; I don't run it, but my landlady runs it for me."

We respectfully submit to the court that this brief resume of the evidence is sufficient for the jury to find that there was an understanding or agreement between Vida White and James B. Miller prior to her going to Tia Juana. That there was an agreement is certain from the fact that the plaintiff in error admitted that he owned The Palace and that Vida White ran it for him. That this agreement was prior to Vida White's going to Tia Juana is certain in that plaintiff in error knew her occupation and telegraphed to a person named White in San Francisco. Vida White received telegrams about the time those referred to in United States Exhibit 3 were sent, according to the testimony of Louise Bordeau. He met Vida White at the depot in San Diego, which circumstance undoubtedly proves an understanding between them, and the next day Vida White was installed as mistress of The Palace in Tia Juana. Therefore, we state without hesitancy that in the absence of any denial or proof on the part of plaintiff in error the jury were forced to the conclusion they reached that there was an agreement between Vida White and James B. Miller prior to her going to Tia Juana, and under the instructions of the court as set out on pages 81-83 of the transcript such an agreement constituted an inducement if there was any consideration. The statement of James B. Miller to Stanley that the woman was his landlady is sufficient upon which to base a conclusion that such relation of employer and employe was not without the customary

remuneration. The fact that licenses were issued to Louise Bordeau and Vida Rogers, and not to Miller, is of no importance as plaintiff in error admitted that Vida White was running the place for him. Under the law of Mexico, both the inmates and landlady in a house of prostitution were required to get licenses [Tr. 46]. On the sufficiency of the evidence see

Wilson v. U. S., 190 Fed. 427 (438).

We come now to the last point argued in the brief of plaintiff in error, viz: the alleged error or errors of the court in instructing the jury. The only exception taken to the instructions of the court is that set out on page 81 of the transcript, which reads as follows:

> "Mr. Rush: The defendant excepts to each and all the instructions given by the court, other than those presented or suggested by the defendant, and to each and every amendment and modification of instructions proposed by the defendant, and to the refusal to give each instruction proposed by the defendant and not given by the court."

Rule 22 of the Rules of the District Court for the Southern District of California reads as follows:

> "Bills of exceptions to charge of court, when and how made.—The party excepting to the charge of the court to the jury must specify distinctly the several matters of law in the charge to which he excepts. Such matters of law, only, will be inserted in the bill of exceptions, and allowed by the court. All exceptions to the charge of the court of the jury shall be specified in writing immediately on the conclusion of the charge, and handed to the court before the jury leave the box. The

> bill of exceptions must be prepared in form, and presented to the judge within ten days after verdict, and in default thereof, the exceptions will be deemed waived."

And rule 10 of the Rules of the Circuit Court of Appeals, Ninth Circuit, reads as follows:

> "Bill of Exceptions. The judges of the district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

It is very apparent from reading the transcript and reading these rules that the assignments of error based on instructions given by the court should be disregarded. As stated by the Circuit Court of Appeals of the Eighth Circuit, in the case of Price v. Pankhurst, 53 Fed. 312, this rule of law is for the purpose of giving the trial court an opportunity to correct any mistakes inadvertently made in charging the jury. As heretofore stated, the transcript in this case affirmatively shows that no such action was taken by the plaintiff in error in this case. It does not appear from the transcript that the trial court's attention was particularly called to the grounds of the objections to the particular in-

structions complained of. In this respect, the court's attention is respectfully directed to the following cases:

Holder v. U. S., 150 U. S. 91;
Baggs v. Martin, 108 Fed. 33;
Ball v. U. S. 147 Fed. 32;
Price v. Pankhurst, 53 Fed. 312;
Burton v. West Jersey Ferry Co., 114 U. S. 474;
Hinchman v. First National Bank, 112 Fed. 391;
St. L., I. M. & S. R. R. Co. v. Spencer, 71 Fed. 93;
Anthony v. Railway Co., 132 U. S. 173;
Shelp v. U. S., 81 Fed. 700;
Mobile & Montgomery Ry. Co. v. Jurey, 111 U. S. 584;
McClendon v. U. S., 229 Fed. 523;
Western Union Telegraph Co. v. Baker, 85 Fed. 690.

Counsel for plaintiff in error, however, have proceeded to argue one instruction of the court on pages 61-62 of their brief, in which they claim the court erroneously stated the law. Their argument is to the same point as that on the demurrer, and our remarks on the demurrer at the beginning of this brief are a sufficient answer to the allegation that there was error in the instruction complained of, the entire point being whether or not the immoral purpose as stated in the indictment was such an immoral purpose as is contemplated by the statute. On pages 65-66 of the brief of plaintiff in error, counsel for plaintiff in error set out an instruction of the court which was given in answer to a question propounded to the court by the jury

after they had deliberated for more than two hours. The transcript does not show that any exception was taken to this instruction at the time given, but on the contrary the transcript shows on page 31 that on December 4, 1916, two weeks after the trial and verdict of the jury, counsel asked the court to note an exception to the instruction given by the jury. This is so clearly contrary to the rules as heretofore stated, governing exceptions to instructions that we do not believe that the court will entertain it for a minute. However, we believe that the instruction complained of correctly states the law, and had counsel taken an exception in due time it would have availed them nothing.

Respectfully submitted,

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